7. That if the defendant Parley Probst does not release and convey to the defendant Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, the hereinafter described property as herein ordered, then said defendant Parley Probst shall be divested of the title of said property and said title shall vest in said Administratrix by operation of this decree.

8. The following is a description of the lands affected by this judgment: Said property being situated in Wasatch County, State of Utah, and described as follows, to-wit:

All of Sections 13, 14, 23, 24, and 26 in Township 4 South, Range 11 West, U.S.B. & M., containing 3,200 acres, more or less.

Subject to reservation in the United States of all minerals and mineral rights.

TOGETHER with all improvements and appurtenances thereunto belonging, including all water rights.

Dated this 7th day of January 1969.

s/ A. Sherman Christensen

A. SHERMAN CHRISTENSEN
UNITED STATES DISTRICT JUDGE

Appendix No. II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, a body politic and corporate of the United States of America, *Plaintiff.*	No. C-172-67
vs.	
PARLEY PROBST and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegap, deceased. *Defendants.*	Findings of Fact and Conclusions of Law

The above entitled matter came on regularly for trial before the Court on the 5th and 6th days of September, 1968, before A. Sherman Christensen, United States District Judge, with plaintiff being represented by John S. Boyden, Stephen G. Boyden, and Ezra T. Clark, Jr.; and the defendant Parley Probst being represented by Wayne L. Black; and Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, being represented by David Sam and James J. Smedley, and the Court having heard

the evidence adduced and being advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. The plaintiff is an Indian tribe with a governing body duly recognized by the Secretary of the Interior, a corporate charter having been granted by the Secretary of the Interior on the 6th day of July, 1938, which charter was ratified according to law, pursuant to Section 17 of the Act of June 18, 1934 (48 Stat. 984), on August 10, 1938, by a majority vote of the adult members of the Ute Indian Tribe living on the Uintah and Ouray Reservation in Utah.

2. The defendant, Parley Probst, is a resident of Heber City, County of Wasatch, State of Utah, and claims to hold fee simple title to the real property hereinafter described.

3. The defendant, Oranna B. Moosman, is a resident of Neola, County of Duchesne, State of Utah, and is the administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, which deceased person is one and the same person as Elizabeth C. Bumgarner.

4. The real property which is the subject of this action is located within the territorial jurisdiction of this Court, said property being situated in Wasatch County, State of Utah, to-wit:

> All of Sections 13, 14, 23, 24 and 26 in Township 4 South, Range 11 West, Uintah Special Base and Meridian, containing 3,200 acres, more or less. Subject to reservation in the United States of all mineral and mineral rights.

Including all water rights and other appurtenances thereto.

5. On September 21, 1959, Elizabeth C. Bumgarner, now deceased, then a mixed-blood member of the Ute Indian Tribe, was the successful bidder at the sale of the said lands held in accordance with U.S.C., Title 25, Section 677 *et seq.*, and the rules and regulations thereafter duly issued by the Secretary of the Interior pertaining to said sale, for the sum of $26,016.

6. On October 28, 1958, prior to receipt of the patent to said property by said Elizabeth C. Bumgarner, and prior to termination of federal supervision over said real property, the defendant Parley Probst and Elizabeth C. Bumgarner entered into a written agreement wherein Elizabeth C. Bumgarner agreed to sell and Parley Probst agreed to purchase said real property for the sum of $35,000. In said contract Elizabeth C. Bumgarner agreed as follows:

(a) To obtain a patent to said property from the United States of America pursuant to procedure of Public Law 671 of the 83rd Congress, 2nd Session.

(b) To apply $26,016 received from Parley Probst, and acknowledged by her, to the purchase of said land pursuant to her bid therefor with the Affiliated Ute Citizens of Utah, Fort Duchesne, Utah.

(c) To offer said land to the members of the Ute Indian Tribe pursuant to Section 15 of Public Law 671 as soon as regulations were formulated by the Secretary of the Interior.

(d) That upon the failure of anyone to bid on said land she would then convey said tract by warranty deed to Parley Probst.

(e) That in the event a bid in excess of $35,000 cash was made for said property at the offering required therefor, that she would do the following:

(1) Notify Parley Probst and permit him to make a higher bid if he wished.

(2) If he did not so wish to repay to him all moneys which he had advanced, together with interest thereon at the rate of 6 per cent per annum, for the period in which she would have had said funds.

(f) To execute a real estate mortgage on said property to said Parley Probst creating a lien on said land to secure repayment of the funds so advanced in the event Elizabeth C. Bumgarner was unable to perform said contract or violated any of the provisions of the agreement.

(g) To immediately deliver possession of said tract of land to Parley Probst.

Said contract was neither submitted to nor approved by the Secretary of the Interior or his authorized representative.

7. On October 28, 1959, Elizabeth C. Bumgarner executed a mortgage upon said property to Parley Probst in the sum of $35,000. Said mortgage was recorded at the request of Glen M. Hatch on October 29, 1959, as Entry No. 79888 in Book 36, page 50 of the

records of Wasatch County, Utah. Said mortgage was neither submitted to nor approved by the Secretary of the Interior or his authorized representative.

8. Parley Probst, on October 28, 1959, issued check No. 5488 payable to the order of the Bureau of Indian Affairs for the sum of $26,016; also on October 28, 1959, Parley Probst issued check No. 5489 payable to the order of Elizabeth C. Bumgarner for the sum of $7,500; further on October 28, 1959, Parley Probst issued check No. 5490 payable to the order of Elizabeth C. Bumgarner for the sum of $1,484. Check No. 5490 was placed in escrow with R. Earl Dillman, Attorney at Law, of Roosevelt, Utah.

9. Elizabeth C. Bumgarner determined to dispose of her interest in the lands, the subject of this litigation, on or prior to October 28, 1959, but there is nothing in the record upon which the court could find that she then or at any other time knew and understood that a determination to sell under such circumstances and subject to posting as required by the contract was illegal or improper, and the court finds, plaintiff having the burden of proof, that Elizabeth C. Bumgarner entered into said contract in good faith.

10. The regulations as set out in 25 C.F.R. Part 243, were promulgated by the Secretary of the Interior on August 11, 1960.

11. On September 20, 1960, the United States of America issued to Elizabeth C. Bumgarner Patent No. 1212875, conveying said real property containing among other provisions the following:

> Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property

herein conveyed without first offering it to the members of the full-blood and mixed blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of such group as defined in the act, it being the intention of this provision to effectuate the purpose of section 15 thereof.

Said patent was recorded on November 14, 1960, as Entry No. 81179, page 470, Book 38 of the records in the office of the County Recorder in and for Wasatch County, State of Utah, at the request of Glen M. Hatch.

12. On November 11, 1960, Elizabeth C. Bumgarner and Parley Probst executed a second writing which Parley Probst had caused to be prepared and which by its terms amended and became part of the agreement of October 28, 1959, providing among other things the following:

(a) That the check in escrow for $1,484 be released to Elizabeth C. Bumgarner even though the conditions originally stated in the first agreement as prerequisite to the delivery had not been performed.

(b) That the offering to members of the Ute Indian Tribe required by Section 15 of Public Law 671 would not be made until such time as Parley Probst requested the same be made.

(c) That in the event Parley Probst requested that said offering to be made to members of the Ute Indian Tribe, Elizabeth C. Bumgarner would

provide in her offering that she may reject any and all offers made to her, and that in making said offers she would stipulate that the sum to be paid therefor must be an amount equivalent to $35,000 plus an amount equivalent to interest at the rate of 6 per cent per annum on $35,000 computed from October 28, 1959, and that, furthermore, she would reject any offer equal to that amount or higher.

(d) That said real estate mortgage would apply to the provisions of this agreement.

Said agreement of November 11, 1960, was neither submitted to nor approved by the Secretary of the Interior or his authorized representative.

13. The defendant Parley Probst was an experienced businessman in real estate and other transactions and all acts of Attorney Glen M. Hatch in relation to the transactions involved in this litigation were authorized by the defendant Parley Probst. The said agreement was prepared as the result of Elizabeth C. Bumgarner's need and desire for the $1,400 held in escrow pending posting of the sale and of information which had come to the knowledge of Probst that others were interested in buying said property and that there would likely be competition if said land were posted for bidding, and a determination on Probst's part to hold up any offering until others interested in the land appeared to lose interest in the project, or as Probst's attorney testified until "these people who manifested this interest, who had no better rights than we did, would cool down on the thing." Mr. Probst was concerned that

members of the tribe might bid for the property in order that the white persons whom he had talked to could ultimately acquire it.

14. Such bidding likely would have been to the advantage of Elizabeth C. Bumgarner in increasing her realization upon the sale of the property through bidding; that Parley Probst realized this, but failed to disclose his knoweldge of the interest of other people in the property, the real intent of the modified agreement and its legal impropriety; and it is fair to infer from the record, and the court finds, that Elizabeth C. Bumgarner at said time was ignorant of these considerations, had family problems, was frequently under the influence of liquor, was in dire need of money and as a result was improperly induced by Probst and his attorney to sign said agreement.

15. That a reasonable time within which to make said offering pursuant to law expired after November 1960 and prior to the death of Elizabeth C. Bumgarner.

16. After the death of Elizabeth C. Bumgarner on November 27, 1963, Oranna B. Moosman was appointed administratrix of the Estate of Elizabeth C. Bumgarner Poowegup by an order of the Probate Division of the Fourth Judicial District Court, Duchesne County, State of Utah, on January 20, 1964. Letters of Administration were subsequently issued by said Court on January 30, 1964. Said administratrix, Oranna B. Moosman, was discharged and her Letters of Administration vacated on January 25, 1965, by an order of the Probate Judge at the time of the final distribution. The Probate Court subsequently approved her reappointment on December 4, 1967, subject to qualifying as required by law.

Letters of Administration were subsequently issued on June 14, 1968.

17. The defendant Parley Probst submitted a creditor's claim dated March 23, 1964, to the Probate Division of the Fourth Judicial District Court of Duchesne County, State of Utah, to which he attached a copy of the agreement of October 28, 1959, and said mortgage between himself and the deceased, without then or thereafter disclosing to the Court the agreement of November 11, 1960.

18. The failure of the defendant Parley Probst and his attorney, Glen M. Hatch, to disclose to the Probate Court and to the attorney of the Estate of Elizabeth C. Bumgarner the purported agreement of November 11, 1960, was an act with fraudulent intent and a part of a scheme to avoid the provisions of 25 U.S.C. 677i, 677n, 25 C.F.R. Part 243 and the covenant running with the lands.

19. The creditor's claim of Parley Probst, the petition for authorization to execute administratrix's deed, the decree authorizing administratrix to execute the deed, and the administratrix's deed were all prepared by attorney for Parley Probst.

20. Pursuant to said creditor's claim and said petition to execute an administratrix's deed dated September 9, 1964, an order was issued by the Court dated September 21, 1964, authorizing the administratrix to execute a deed conveying said real property to Parley Probst. Thereafter, on the 21st day of September, 1964, defendant Oranna B. Moosman did execute and deliver to defendant Parley Probst an administratrix's deed

conveying said property to defendant Parley Probst. At the request of his attorney, on October 5, 1964, said deed was recorded as Entry No. 86515, Book 49, pages 559-560 of the records of the County Recorder, Wasatch County, State of Utah.

21. The Creditor's Claim, the Petition for Authorization to Execute Administratrix Deed, and the Administratrix Deed, were submitted and acted upon pursuant to the undisclosed and continuing intent of Parley Probst to obtain said property in disregard of the posting requirement aforesaid.

22. At the time of the filing of Creditor's Claim and at all times during the probating of the Elizabeth C. Bumgarner Poowegup Estate neither the Probate Court, Administratrix, nor the attorney for the Administratrix had knowledge of the November 11, 1960 agreement.

23. In executing the November 11, 1960 agreement Parley Probst and Elizabeth C. Bumgarner were not in pari delicto. Probst unknown to her had already determined to circumvent the requirements of posting to prevent the receipt of a greater sales price by her and unknown to her had drafted and designed said agreement for this purpose. There was no culpability on her part when she executed the November 11, 1960 agreement or at any other time which in equity and good conscience should bar the rights awarded herein in favor of her estate.

24. That by the design and planning of Parley Probst an offering was not made as required by Sec. 15 of Public Law 671 (25 USCA 677n) to members of the

tribe in accordance with the form designated by the Secretary within a reasonable period of time after there had been a determination to sell as contemplated by the Act and or after the rules governing the form of the offering had been promulgated by the Secretary. That a reasonable period of time for the offering expired prior to November 27, 1963.

25. The failure of the defendant Parley Probst to disclose to the Probate Court and to Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, the agreement of November 11, 1960, was an act of material misrepresentation, concealment, and fraud upon the Estate of Elizabeth C. Bumgarner in view of the allegations of the Creditor's Claim which Probst caused to be filed. If Probst had revealed the true facts with reference to the November 11, 1960 agreement and his intent and purpose to avoid posting and bidding as required by law, there would have been no Administratrix Deed issued.

26. The Agreement of November 11, 1960, was not discovered by Oranna B. Moosman until sometime during the summer of 1966, nor did she have notice or knowledge otherwise before that time that a fraud had been perpetrated against the estate.

37. As early as November 18, 1959, plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation, had knowledge of the October 28, 1959 executory sale by and between Elizabeth C. Bumgarner as Seller and Parley Probst as Buyer, said knowledge being evidenced by the minutes of the meeting of said tribe on November 19, 1959. While plaintiff was further aware of Probst's continuing interest in 1960, it had no notice or knowl-

edge of any fraud in connection with the sale of said land (except as may have been constructively given by the recording of the Administratrix Deed without posting having been made) until the year before the commencement of this action, September 20, 1967.

28. The evidence is equivocal and uncertain whether the agreements of October 28, 1959, and the mortgage of October 28, 1959, were instrumentalities and part of a scheme, artifice and design by Parley Probst to unlawfully purchase said lands. The reservation in said agreement of a further opportunity to bid in the event there were bids beyond $35,000 is suggestive but since regulations were not then issued and there was some uncertainty as to what they would contain, there could have been a misapprehension concerning the propriety of said contracts. As to Elizabeth C. Bumgarner the evidence is clearly insufficient to show that she was not acting in good faith; and in any event, the court does not believe as to either that a wrongful intent or related fraud is shown with respect to said initial transactions by clear or convincing evidence. The agreement of November 11, 1960, rendered it clear and convincing that Parley Probst then intended to obtain title to said lands without complying with Title 25, U.S.C. Sections 677i and 677n and said regulations issued by the Secretary of the Interior pursuant thereto, and the covenant running with said lands as contained in the deed to Elizabeth C. Bumgarner, and at least from that time forward it is established by clear and convincing evidence that he was not proceeding in good faith and that he did intend not only in violation of any possible rights of the plaintiff or its members but in violation of Elizabeth C. Bumgarner's

rights to utilize his designed contract with the latter to circumvent the controlling statute and regulations. Elizabeth C. Bumgarner was not in pari delicto in connection with the November 11, 1960, contract, or at all for the reasons herein above indicated.

29. The obtaining of the conveyance by administratrix's deed from defendant Oranna B. Moosman to defendant Parley Probst after the death of Elizabeth C. Bumgarner was an act perpetrated by said Parley Probst with fraudulent intent to further avoid the provisions of 25 U.S.C. 677i, 677n, 25 C.F.R. Part 243 and the covenant running with said lands.

30. The lands, the subject of this litigation, were never offered to the Ute Indian Tribe or to its members by Elizabeth C. Bumgarner, or by anyone on her behalf.

31. Plaintiff and its constituent members and others have been denied opportunity to purchase said lands from Elizabeth C. Bumgarner or her estate at the price they were offered to defendant Parley Probst after said Elizabeth C. Bumgarner had determined to dispose of said lands, by reason of said scheme, artifice and design and the otherwise unlawful acts of defendant Parley Probst.

32. In the summer of 1966, Plaintiff by and through its employees and agents and the Administratrix of the Elizabeth C. Bumgarner Estate first discovered the fraudulent scheme, artifice and design employed by defendant Parley Probst in connection with his contracts and relations with Elizabeth C. Bumgarner to prevent plaintiff or others from having an opportunity to pur-

chase said property as provided by law, and could not by reasonable diligence and inquiry have sooner discovered said unlawful scheme, artifice and design.

33. Purchases of tribal assets of mixed-blood members by the Ute Indian Tribe of the Uintah and Ouray Reservation for and on behalf of its members and such purchases pursuant to offers required by the provisions of Title 25 U.S.C. 677n have been approved and sanctioned by the Secretary of the Interior by regulations providing therefor and by a course of practice extending from October 14, 1960, to and including April 8, 1964.

34. The final roll of full-blooded members and mixed-blooded members of the Tribe was approved by the Secretary of the Interior on March 27, 1956, and published in the Federal Register on April 5, 1956, (21 F.R. 66).

35. Parley Probst has had possession and use of said lands since October 28, 1959, and has received all the rents, government benefits and profits therefrom. Such rents, benefits, profits and income are sufficient to reasonably compensate him for interest on said $35,000 after November 11, 1960, and for taxes paid and improvements made to said property while in his possession; and in any event it would be equitably unjustified to allow him any relief or benefit by reason of his illegal plan and artifice aforesaid except such possession to date and a return of said $35,000, together with interest on the sum of $33,516 from October 28, 1959, to November 11, 1960 at the rate of six per cent per annum.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of this action and the persons of the parties.

2. This action arises under the Act of August 27, 1954, 68 Stat. 868; U.S.C., Title 25, Section 677 *et seq.*

3. The jurisdiction of this Court is conferred by the Act of October 10, 1966, 80 Stat. 880; U.S.C., Title 28, Section 1362.

4. Elizabeth C. Bumgarner was not precluded by any statute, regulation or principle of law from borrowing money for the purpose of her acquisition of the title to the property in question. As of October 28, 1959, when she contracted with Parley Probst for his acquisition of said property through her, but subject to posting as required by law, there is no absolute rule prohibiting Elizabeth C. Bumgarner from reaching a determination to sell subject to posting as provided by law and regulation and the other requirements of law. It seems to the Court that to say that before a determination to sell could even be formed in the mind of an Indian, a agreement would have to be submitted to the Secretary and the requirements of law otherwise fully complied with would be unrealistic and I would interpret the requirements as authorizing tentative agreements but subject to the posting and other requirements of law before they could be deemed finally consummated. At least there is uncertainty on the question of timing in this respect which has led me to believe that if the basic framework of the October agreement and mortgage was illegal, at least there was enough uncertainty existing at that time to raise question as to any bad intent on the part of Probst and to make it appear that there was not shown

any bad intent on the part of Elizabeth C. Bumgarner in entering into the initial transactions, and, indeed, that the initial transaction may not have been void from the beginning, had posting and opportunity to bid been accomplished pursuant to the statute and regulations within a reasonable time. On the other hand, the provision included by Probst in the initial contract, attempting to protect his right to acquire the property in spite of higher bids by members of the Tribe, throw into question the validity of the contract from the beginning as far as Probst is concerned.

5. But whether the contract of October 1959 is considered merely voidable or absolutely void in view of the statutes and regulations is immaterial insofar as the proper solution of this case is concerned: If void from the beginning not only would Probst not be able to base any rights thereon but the Tribe would not necessarily have rights predicated thereon, unless Elizabeth C. Bumgarner and Probst were so far in pari delicto as to necessitate on equitable principles a reconstruction of some right on the part of members of the Tribe to avoid unjust enrichment on the part of her Administratrix and Probst, or other inequitable or unconscionable result. If the initial contract were not necessarily void, it is clear that the amendment of November 11, 1960 rendered it illegal and void as of that time and we are still confronted with the problem of whether Elizabeth C. Bumgarner and Probst were in pari delicto with reference to the latter contract or in view of other developments.

6. Even though a solution of this case in accordance with legal and equitable requirements and principles de-

pended upon a recognition of the rights of plaintiff as distinguished from the claims of either the Administratrix or Probst, the Court would be confronted with difficult if not insurmountable problems: As indicated in the Findings, and as I am convinced, Mrs. Bumgarner was more used than using, more imposed upon than imposing. Probst managed whatever plans there were for voidance of the statute and the regulations and obtained an illegal advantage over Mrs. Bumgarner herself in precluding higher bidding for the property when he learned that others might cause it to be bid up. The plaintiff Tribe would have the benefit of the price thus set and maintained by what they now claim to be the fraud of Probst and Bumgarner but which I believe was primarily the fault of Probst. It is impossible to have a bidding now because of the great change in conditions. What the result of a posting of the property would have been at the time cannot be reconstructed except by sheer speculation. The plaintiff had no absolute right to purchase the property at a fixed price.

7. Even though there were an appropriate way for me to place the Tribe now in the position of Probst with reference to the purchase price of the property and permit it to acquire the property for such purchase price, it is my opinion nonetheless that as between the Tribe and the successors in interest of Elizabeth C. Bumgarner the latter has superior rights and is entitled to the property. It is obvious that neither equity nor law permits Probst to retain the property.

8. The deed of the Administratrix to Parley Probst was obtained contrary to the provisions of Title 25 U.S.C. 677i and 677n notwithstanding the fact that the

final conveyance occurred after August 27, 1964, the delay in conveyance having been occasioned as a result of the scheme, artifice and design of said Parley Probst to evade the provisions of said law.

9. The defendants Parley Probst and Elizabeth C. Bumgarner were not in pari delicto with respect to any scheme, artifice and design, or any other act or agreements to circumvent the provisions of 25 U.S.C. 677 *et seq.* and the rules and regulations issued pursuant thereto.

10. The relative positions of Probst and Elizabeth C. Bumgarner during all times and under all circumstances material herein were so disparate and shockingly unequal as to prevent equity from tolerating the idea that Probst could use his power and influence over Elizabeth C. Bumgarner, which was illegal and contrary to public policy, and then invoke principles of equity and law to enable him to retain that which he had obtained through his artifices and superior position. *CF.* Herrick v. Lynch, et al., 150 Ill. 283, 37 N.E. 221. Nor do principles of equity preclude the Administratrix from recovering the property as against the claims of the plaintiff on the ground that Elizabeth Bumgarner was in pari delicto with Probst, or could not come into court with clean hands. It seems to me that if at any time before the death of Mrs. Bumgarner she had taken the position that her dealings with Probst were void and of no effect, or were voidable on her part, she would have been under no obligation to convey to Probst or to surrender the property to the plaintiff Tribe at the price she had agreed to pay Probst. Her death did not weaken that position even though we assume that the Administratrix

would be in no better position than she would have been in. In view of the unequal position of the parties, and the failure of any clear and convincing proof, or indeed any substantial proof that Mrs. Bumgarner realized the implications of the various contracts, her heirs should not be deprived of the property any more than she should have been. The regulations providing for posting of the property were as much or more for the protection of the Indian owner as for the protection of the members of the Tribe who might bid upon the property. In view of the history of the Indians and their relationship with the government, there was and is a strong public policy in favor of the Indian owner in the position of Mrs. Bumgarner, and such public policy under federal law will not permit the court to readily reject her rights under the doctrine of pari delicto. *Cf.* Perma Mufflers v. International Parts Corporation, 392 U.S. 134 (1968).

11. State law is not incompatible with principles of federal law. Equality of culpability was held to be not present in Schvaneveldt v. Noy-Burn Milling and Processing Corp., 10 Utah 2d 1, 347 P.2d 553, even though the plaintiff had participated to some degree in activities found to be unlawful. There was no mechanical application of the doctrine to the exclusion of the question of relative culpability. In considering a related doctrine, that of clean hands, the Utah court also has similarly rejected a mechanical application of the rule, particularly where any wrongs participated in by a claimant did not injure the other party. See Park v. Jameson, 12 Utah 2d 141, 364 P.2d 1. In the case at bar the plaintiff Tribe suggests injury by being deprived of the opportunity of acquiring the property for $35,000. It is specu-

lative because of the impossibility of reconstructing what would have happened should the property have been posted that the Tribe would have acquired the property at all and certainly it is speculative that it would have acquired it for $35,000. But in view of the increase in value of the property and the rights of the estate which need not be premised upon mere speculation, the award of the land to the administratrix is supportable both by the evidence and the law as the court views it.

12. The rights of the administratrix to the property are not barred by any state or federal statute of limitations nor by any laches or estoppel.

13. That by decree of this court Parley Probst should be directed to execute a good and sufficient conveyance of said real property free from encumbrance and to deliver the same forthwith to the said administratrix in return for the payment of the sum of $35,000, together with interest on $33,516 from October 28, 1959, to November 11, 1960; providing that if said conveyance is not so delivered Parley Probst shall be divested of the title of said property and that the title shall vest in said administratrix by operation of said decree. Taxable costs should be awarded against Parley Probst.

14. Counsel for the administratrix is directed to prepare, serve and lodge with the court within ten days a proposed form of judgment which if not approved as to form by the other parties will be settled by the court on its next rule day.

Dated this 9th day of December, 1968.

A. Sherman Christensen
UNITED STATES DISTRICT JUDGE

Appendix No. III

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term, 1970

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a body politic and corporate of the United States of America,

Plaintiff-Appellant,

vs.

PARLEY PROBST and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,

Defendants-Appellees.

No. 125-69

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a body politic and corporate of the United States of America,

Plaintiff-Appellee,

vs.

PARLEY PROBST,

Defendant-Appellant,

and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,

Defendant-Appellee.

No. 126-69

Appeal from the United States District Court for the District of Utah, Central Division
(D. C. No. C 172-67, Civil)

John S. Boyden (Stephen G. Boyden on the brief) for Ute Indian Tribe, Appellant in No. 125-69 and Appellee in No. 126-69.

Wayne L. Black (Robert D. Moore on the brief) for Parley Probst, Appellee in No. 125-69 and Appellant in No. 126-69.

James J. Smedley (David Sam on the brief) for Oranna B. Moosman, Appellee in both Nos. 125-69 and 126-69.

Before MURRAH, Chief Judge, and BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

We have here a three-way fight over Indian land. Plaintiff-appellant Ute Indian Tribe sued for certain equitable relief and for cancellation of a deed given by defendant-appellee Oranna Moosman as administratrix of the estate of Elizabeth Bumgarner Poowegup to defendant-appellant Parley Probst. Jurisdiction lies under 28 U.S.C. § 1362 because the matter in controversy arises under the Act of August 27, 1954, 25 U.S.C. § 677 et seq. The answer of Probst asserts the validity of the deed and counterclaims for damages. The administratrix denies that the Tribe has any right to the land and, by way of cross-claim against Probst, asserts that the deed to

him is void. The district court held that the administratrix was entitled to the land. Both the Tribe and Probst appeal.

The Act provides for the division of the assets of the Tribe between the full-blood and mixed-blood groups, the termination of federal supervision over the latter, and the development of a program for such termination over the former. After the division of the assets between the two groups, the mixed-bloods were to devise a plan for the distribution of its assets among its members. 25 U.S.C. § 677(L). If a majority of the mixed-blood group decided that partition of any land was impracticable and, if the Secretary of the Interior approved, the land could be sold and the proceeds divided among members of the group. 25 U.S.C. § 677 [L](5). Before the termination of federal supervision, a mixed-blood could dispose of his interest in acquired tribal property only with the approval of the Secretary. See 25 U.S.C. § 677n and 25 CFR § 243.3 (1966 ed.).[1] *Federal supervision over tribal land terminated when a patent issued thereto.* 25 CFR § 243.2(h). Until August 27, 1964, a patent conveying any tribal land to a mixed-blood had to provide that until that date members of the

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[1]Section 677n provides:

"Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period."

Tribe had the right of first refusal of an offer to sell. 25 U.S.C. § 677n and 25 CFR § 243.4.

In the division between the groups, the mixed-bloods received the 3,200 acres of land in question. They decided that partition was impracticable and that the land should be sold. It was appraised at $26,600. Secretarial approval is conceded.

Elizabeth, a mixed-blood, submitted the high bid of $26,016 for the land. She did not have the necessary money and interested Probst, a non-Indian, in the land. A written contract was prepared and executed on October 28, 1959, whereby Elizabeth sold to Probst for $35,000 and Probst went into immediate possession. The contract recognized that no patent had been issued and that Elizabeth would have to comply with the first-refusal provision of the statute. Elizabeth gave Probst a $35,000 mortgage on the land to assure compliance with the contract terms. The mortgage was duly recorded. Neither the contract nor the mortgage was submitted to the Secretary for his approval.

On August 11, 1960, the Secretary promulgated regulations as authorized by the Act. 25 U.S.C. § 677z. See 25 CFR §§ 243.1-243.12 (1966 ed.). A patent was issued to Elizabeth on September 20, 1960. It contained the first-refusal provisions required by the statute and regulations. On November 11, 1960, Elizabeth and Probst executed an amendment to the October 28, 1959, contract. It provided that certain escrowed funds be released to Elizabeth; that the required offering should not be made "until such time as the Party of the First Part [Probst] requests that the same be made"; and that

if such offering was made at Probst's request certain conditions for his protection should be included within the offer.

Elizabeth was killed in an accident on November 27, 1963, without making the offer and without conveying to Probst. Oranna was appointed administratrix of Elizabeth's estate. Probst filed a creditor's claim against the estate on the basis of the 1959 sale contract and mortgage. Pursuant to court order, the administratrix conveyed the land to Probst by a September 21, 1964, deed which was recorded on October 5, 1964. The pending suit was brought by the Tribe on September 20, 1967.

The trial court held that Probst was guilty of fraud; that Elizabeth was not in pari delicto; that the first-refusal provisions "were as much or more for the protection of the Indian owner as for the protection of the members of the Tribe"; that public policy favored the Indian owner; that the impossibility of reconstructing what would have occurred had there been a offering by Elizabeth and the increase in value of the property supported the award of the land to the administratrix; and that she was not barred by any statute of limitations, by laches, or by estoppel.

The construction and application of § 677n is decisive. The land was a tribal asset. It was real property as that term is used in the section because it was acquired by a mixed-blood. See definition of "real property" in 25 CFR § 243.2(g). The patent to Elizabeth contained the first-refusal provision. Neither she nor her administratrix made the required offer. The question is the effect of such non-action.

The arguments of the parties lead us into many by-paths which need not be traveled. The Act was intended to distribute tribal property and terminate federal supervision over the mixed-bloods. See § 677 and House Report No. 2493, 2 U.S.Cong. News 54 3355-3359. We are aware of no legislative history which illuminates the intent of the first-refusal provisions. The reliance of the Tribe and the administratrix on the provision of § 677i that a contract made in violation of that section shall be null and void is misplaced. As we read that section it applies to undivided interests and not to real property which a mixed-blood has acquired by purchase. Our concern is whether the statute confers upon the Tribe the unconditional right to meet the price at which the selling mixed-blood offers land acquired from tribal assets.

Contrary to the trial court, we believe that Congress, by incorporating § 677n into the Act, had in mind primarily the protection of the Tribe and only secondarily, if at all, the protection of the selling mixed-blood. The first-refusal provision gave the Tribe, for a ten-year period, the opportunity to recover land which it had lost by the division of assets between the two groups. The language of § 677n means that Congress believed it preferable that tribal land acquired by a mixed-blood, who determined to sell before 1964, return to the Tribe if the Tribe wanted it and could match the offering price. This procedure does not assure a higher price to the mixed-blood, because the Tribe is required only to meet the offering price. Only in the event two or more members of the Tribe compete for acquisition of the land does bidding take place. 25 CFR § 243.7.

The statute must be construed and applied to ef-

fectuate the congressional intent. United States v. American Trucking Associations, Inc., 310 U.S. 534, 542; see also Federal Trade Commission v. Fred Meyer, Inc., 390 U.S. 341, 348-352. We believe that when a mixed-blood determined within the ten-year period to dispose of his acquired interest, the Tribe had the right to have the property offered to it in accordance with the statute and regulations. *Elizabeth determined to sell the land at or before the time when she entered into the first contract with Probst.* She did not offer the land to the Tribe. *Her administratrix in turn did not offer it, but instead waited until the expiration of the ten-year period and then gave Probst a deed.* The Tribe was thus deprived of its statutory right. It makes no difference whether this result was intentional or unintentional or whether it was the upshot of a fraudulent scheme, good-faith ignorance, or ineptness. Whatever the reason, the inescapable fact is that the Tribe was not given the opportunity to reacquire the land.

Probst argues that the assertion of this right is barred by the Utah statute of limitations, Utah Code Ann. 1953, § 78-12-26(3), which provides that a fraud action must be brought within three years after the discovery by the aggrieved party of the fraudulent act. Holmberg v. Armbrecht, 327 U.S. 392, 395-397, holds that a suit in a federal court to enforce in equity a federally created right is not controlled by the forum statute of limitations. The Tribe seeks in federal court equitable relief from the denial of a federal statutory right. There is no applicable federal statute of limitations. Under Holmberg the state statute *does not apply* and the question is whether the Tribe is chargeable with laches.

The essence of the defense of laches is prejudice to a defendant through unconscionable delay by a plaintiff in the assertion of his claim. Costello v. United States, 365 U.S. 265, 282, and Potash Co. of America v. International Minerals & Chemical Corp., 10 Cir., 213 F.2d 153, 154. Unconscionable delay can occur only after a party discovers, or by the exercise of reasonable diligence could have discovered, the wrong of which he complains. Here the wrong was the denial to the Tribe of its right of first refusal. To sustain his claim of knowledge on the part of the Tribe, Probst relies on November 18, 1959, minutes of a tribal meeting stating that Elizabeth was contemplating the sale of the land, the recording of the mortgage, the payment by Probst of taxes on the land, a 1960 telephone call between the lawyers for the Tribe and Probst, a conversation after Elizabeth's death among Probst, his lawyer, and a tribe official, and the records of the Bureau of Indian Affairs showing that Probst advanced the purchase price to Elizabeth. These facts, considered separately or together, do not show any action by Probst or Elizabeth to deny to the Tribe its statutory right of first refusal. The denial of that right first occurred in the November 11, 1960, amendment to the October 28, 1959, sale agreement. In that document Elizabeth agreed not to offer the land to the Tribe without a request from Probst. The Tribe did not have knowledge of the amendment until the summer of 1966. Even if the Tribe is charged with constructive notice of the recorded deed from the administratrix to Probst, we believe that the delay of less than three years in the institution of the suit was not unconscionable. In any event, Probst has shown no prejudice resulting from the delay. He has been in possession of the land since

1959 and has enjoyed the benefits of its use. In our opinion laches is no bar to the claim of the Tribe.

The question remains of what relief the court should fashion to remedy the wrong. When federally secured rights are invaded, federal courts must adjust their remedies to grant appropriate relief. J. I. Case Co. v. Borak, 377 U.S. 426, 433; see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414, n. 13. It is impossible to reconstruct what would have occurred if Elizabeth had made the required offering. In addition, the ten-year period fixed by the statute has passed.

To do equity a decree should put the parties in the position where they would have been if the required offer had been made. From our review of the record we are convinced that this should be done without regard to all the charges and countercharges of fraud, misconduct, and bad faith. When everything else is put aside, the fact remains that Probst, Elizabeth, and the administratrix by their actions deprived the Tribe of a federally created right and that right must be vindicated by affording the Tribe an opportunity to acquire the land.

The administratrix points out that the offer required by § 677m must be made "to the members of the tribe" and argues that the Tribe itself may not be the purchaser of the land. We are not persuaded. Under the regulations, 25 CFR § 243.6, the superintendent was required to notify the Tribe of any offers to sell. As found by the trial court in an unchallenged finding of fact, *the Tribe had on occasion purchased property offered by mixed-bloods between 1960 and 1964 and these purchases had been approved by the Secretary.* Two

letters from Assistant Secretaries of the Interior state that the offering required by the Act ran to the Tribe as well as to its members. Construction of an act by the agency charged with its administration should be followed unless there are compelling indications that it is wrong. Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 381. Here there are no such indications. What the members of the Tribe can do individually they can do collectively as a tribe.

The administratrix argues that to permit the Tribe to purchase will deprive her of the advantage which might be secured through competitive bidding. The argument comes too late. If either she or Elizabeth desired competitive bidding, they each had time to make the offer which the statute requires; and they chose not to do so. In any event, the first-refusal provision is primarily for the benefit of the Tribe and its full-blood members and only incidently for the benefit of the selling mixed-blood. We see no reason why the Tribe should not have an apportunity to buy the land without putting it up for bidding.

A decree should be entered permitting the Tribe to purchase the land within a reasonable time by the payment to Probst of his purchase price, $35,000, plus interest thereon from October 28, 1959, to November 11, 1960. We cut off the interest on the latter date because then Probst and Elizabeth made the amendment to the contract which circumvented the statute. The payment by Probst of taxes on the land and the minor improvements which he made thereon are set off by the fact that he has had the use of the land for over ten years. The

decree should make appropriate provisions for investiture of title to the land in the Tribe upon the payment by it of the required amount to Probst.

Reversed and remanded for further proceedings consistent with this opinion.

Appendix No. IV

Nos. 125-69 and 126-69 — UTE INDIAN TRIBE v. PROBST, et al.

ON REHEARING

PER CURIAM.

We have before us the separate petitions of appellee Oramna Moosman and appellee Probst for rehearing.

Oramna asserts that the Termination Act, 25 U.S.C. 677 et seq., as construed and applied is unconstitutional because it denies due process to the mixed-bloods in that the enforcement of the first-refusal right of the Tribe arbitrarily and capriciously discriminates against the mixed-blood group. The theory appears to be that, because of the economic situation of the mixed-bloods and because of their continuing need for federal supervision, the protective provisions of the Act are for their benefit and the use of those provisions for the benefit of the Tribe is an unreasonable classification which denies equal protection.

The record contains no evidence of their economic condition or need for continued supervision. The legislative history shows that the mixed-bloods desired termination of federal supervision. This appears in the following excerpt from House Report No. 2493, 83rd Cong. 2d Sess., 2 U.S.Cong. News '54, 3355, 3356:

> "The action proposed by this bill will permit the mixedbloods to progress toward termination of Federal supervision without being held back by the fullbloods who desire continuation of

> wardship status. According to testimony from members of the Ute Tribe, the majority of the mixedblood group feel that they are ready for a termination of Federal supervision over their property and the fullblood Indians believe that they are not ready for such action.

Although the Fifth Amendment does not contain an equal protection clause as does the Fourteenth Amendment, which applies to the states, discrimination may be so unjustifiable as to violate due process. Bolling v. Sharpe, 347 U.S. 497, 499. In the case at bar the classifcation into the two groups was supported by the Indians, was relevant to the purposes of the legislation, and had a reasonable basis. We find no arbitrary or capricious discrimination which violates Fifth Amendment due process. See Detroit Bank v. United States, 317 U.S. 329, 337-338.

Oranna says that the action of the court usurps the power of the Secretary to approve the sale and that, because the Secretary never approved the sale, the deed to Probst is ineffective. Probst argues that his deed is good because it was executed after the expiration of the ten-year period during which the Tribe has the first-refusal right. The facts are that no one asked for the approval of the Secretary and that the machinations of Probst, Elizabeth, and Oranna delayed the execution of the deed until after the ten-year period. Elizabeth determined to sell to Probst in October, 1959, and made a $9,000 profit on the sale. We are concerned with the rights of the Tribe. The failure of Probst, Elizabeth, and Oranna to seek the approval of the Secretary and to offer the land to the Tribe cannot defeat the right of the Tribe.

Probst argues for the first time that the first-refusal

provision of § 677n applies only to distributive shares and not to purchased property. The land was a tribal asset which was acquired through purchase by Elizabeth in accordance with § 677[L](5). Section 677n permits a mixedblood to dispose of his interest in tribal assets before termination of federal supervision on the condition that the Secretary approve. The section goes on to say that if a mixed-blood determines to dispose of his interest "in any of said real property" within the ten-year period he shall first offer it to the Tribe and that the requirement of such offer shall be a covenant to run with the land and shall be expressly provided in any patent issued before the expiration of that period. The regulations, 25 CFR § 243.2(g), define real property to mean "any interest in land set apart to the mixed-blood group and thereafter acquired by mixedblood members under the terms of the Act, * * *." We believe that the intent of § 677n was to make the first-refusal right apply to both distributive shares and to purchased tribal land. The Secretary so construed it both in the regulation and in the patent issued to Elizabeth. In our opinion the administrative construction is correct and should be followed. See Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 381.

The reliance of Probst on laches is misplaced. The analogous, but inapplicable, Utah statute of limitations is three years. As we have heretofore pointed out, the events which gave the Tribe notice of the conveyance without the required offer occurred within three years before the suit was brought. In the circumstances, the burden is on the defendant to show extraordinary circumstances which require the application of the doctrine

of laches. Shell v. Strong, 10 Cir., 151 F.2d 909, 911. Probst made no such showing.

The petitions for rehearing are severally denied.

Appendix No. V

AGREEMENT

THIS AGREEMENT made and entered into at Roosevelt, Duchesne County, State of Utah this 28th day of October, 1959 by and between PARLEY PROBST of Heber, Wasatch County, Utah, party of the first part, and ELIZABETH C. BUMGARNER of Ft. Duchesne, Uintah County, Utah, party of the second part,

WITNESSETH:

WHEREAS, party of the second part is the successful bidder for the property described hereinbelow at a bid conducted by the Affiliated Ute Citizens of Utah, and is entitled pursuant to said bid to secure title to said property, and

WHEREAS, party of the second part desires to sell said property to party of the first part for Thirty Five Thousand Dollars ($35,000.00) and,

WHEREAS, the steps described hereinbelow will have to be followed in order for her to obtain marketable title to said property, and

WHEREAS, party of the first part desires to be assured that he will receive either marketable title or the refund of all funds advanced by him,

NOW THEREFORE, in consideration of the mutual covenants and promises hereinbelow contained the parties agree as follows:

1. Party of the second part agrees to sell, and party of the first part agrees to purchase the following described real property situated in Wasatch County, State of Utah, to-wit:

> Sections 13, 14, 23, 24 and 26 in Township 4 South, Range 11 West, USB & M, containing 3200 acres, more or less. Subject to reservation in the United States of all minerals and mineral rights.
>
> Including all water rights and other appurtenances thereto.

2. Party of the second part warrants and promises to obtain a patent from the United States of America to said property pursuant to procedure of Public Law 671 of the 83 Congress, 2nd Session by specifically taking the following steps:

(a) Party of the second part agrees to apply Twenty Six Thousand Sixteen Dollars ($26,016.00) Dollars, receipt from the party of the first part, which she duly acknowledges herein, to the purchase of said land pursuant to her bid therefor with the Affiliated Ute Citizens of Utah, Ft. Duchesne, Utah.

(b) Party of the second part further agrees that as soon as regulations are formulated by the Secretary of the Interior, she will offer this tract to the members of the Ute Indian Tribe, pursuant to Section 15 of Public Law 671 aforesaid, and

(c) Upon the failure of anyone to bid on said land, she will then convey said tract by warranty deed to party of the first part.

(3) Party of the first part agrees to pay for said

land the sum of Twenty Six Thousand Sixteen Dollars ($26,016.00) receipt of which is hereby acknowledged by placing the same in escrow with the Realty Office at the Uintah Ouray Indian Agency at Ft. Duchesne, Utah for the purpose of payment on second party's bid on said land; Seventy Five Hundred Dollars ($7500.00) cash; receipt of which is hereby acknowledged, and Fourteen Hundred Eighty Four Dollars ($1484.00) receipt of which is hereby acknowledged to be placed in escrow with Mr. R. Earl Dillman, Attorney at Law, Roosevelt, Utah to be paid to party of the second part upon full compliance by her with the offering procedure referred to hereinabove and execution by her of a warranty deed to said property conveying marketable title to party of the first part, accompanied by patent from the United States of America conveying marketable title to the party of the second part, or a certified copy thereof.

4. Party of the second part agrees that in the event that a bid in excess of Thirty Five Thousand ($35,000.00) Dollars, cash, is made for said property at the offering required hereinabove, that she will do the following:

(a) Notify party of the first part and permit him to make a higher bid if he wishes.

(b) If he does not so wish, to repay to him all monies which he has advanced, together with interest thereon at the rate of six (6%) per cent per annum, for the period in which she would have had said funds.

(f) Party of the second part further agrees to execute a real estate mortgage on said property to

party of the first part, creating a lien on said land to secure re-payment to party of the first part of the funds so advanced in the event that she is unable to perform said contract or violates any provision of this agreement.

5. Party of the first part is entitled to immediate possession of said tract.

IN WITNESS WHEREOF, parties have executed this agreement intriplicate the day and year first above written.

(s) Parley Probst
Party of the First Part

(s) Elizabeth C. Bumgarner
Party of the Second Part

STATE OF UTAH)
County of Duchesne) ss.

On the 28th day of October, A.D. 1959, personally appeared before me Parley Probst and Elizabeth C. Bumgarner, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

(s) R. Earl Dillman
Notary Public
Roosevelt, Utah

Appendix No. VI

AGREEMENT

This Agreement made and entered into at Fort Duchesne, Uintah County, State of Utah, this 11th day of November, 1960, by and between PARLEY PROBST of Heber, Wasatch County, Utah, PARTY OF THE FIRST PART and ELIZABETH C. BUMGARNER of Fort Duchesne, Uintah County, Utah PARTY OF THE SECOND PART.

WITNESSETH:

WHEREAS, the parties have heretofore entered into an Agreement dated October 28, 1959 for the sale of the following described real property situated in Wasatch County, State of Utah, to-wit:

> Sections 13, 14, 23, 24 and 26 in Township 4 South, Range 11 West, USB & M. containing 3200 acres, more or less. Subject to reservation in the United States of all minerals and mineral rights.
>
> Including all water rights and other appurtenances thereto.

and,

WHEREAS, under the terms of said Agreement R. Earl Dillman, Attorney at Law of Roosevelt, Utah, is holding a check from the Party of the First Part to the Party of the Second Part in the amount of One Thousand Four Hundred Eighty Four Dollars ($1,484.00) as escrow, and

WHEREAS, the parties desire to amend said

Agreement only in the respects stated hereinbelow and further desire that this Agreement shall become a part of said Agreement and the terms hereof shall be read as amendatory to said Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinbelow contained the parties hereby agree as follows:

(1) Party of the First Part agrees that the escrow may turn the above mentioned check for One Thousand Four Hundred Eighty Four Dollars. ($1,484.00) over to the Party of the Second Part even though the conditions originally stated in the contract as a prerequisite to such delivery have not yet been performed.

(2) Parties agree that the offering of said property pursuant to Section 15 of Public Law 671, as set forth in paragraph 2b of the original agreement between the parties shall not be made until such time as the Party of the First Part requests that the same be made.

(3) Party of the Second Part agrees that in the event that Party of the First Part requests that said offering be made, that she will do so with the provision in her offering that she may reject any and all offers made to her, and that in making said offer she will stipulate that the sum to be paid therefor must be an amount equivalent to Thirty Five Thousand Dollars ($35,000.00) plus an amount equivalent to interest at the rate of Six Per Cent (6%) per annum on Thirty Five Thousand Dollars ($35,000.00) computed from October 28, 1959; and that furthermore, she will reject any offer equal to that amount or higher. Parties further agree that that certain real estate mortgage between the

parties dated October 28, 1959, and the lien thereof shall extend to the provisions of this agreement.

IN WITNESS WHEREOF, parties have executed this Agreement the day and year first above written.

(s) Parley Probst
(s) Elizabeth C. Bumgarner

STATE OF UTAH)
COUNTY OF WASATCH) ss.

On the 11th day of November, A.D. 1960, personally appeared before me PARLEY PROBST, the signer of the within instrument who duly acknewledged to me that he executed the same.

(Unintelligible)
Notary Public

STATE OF UTAH)
COUNTY OF UINTAH) ss.

On the 11th day of November, A.D. 1960, personally appeared before me ELIZABETH C. BUMGARNER, the signer of the within instrument who duly acknowledged to me that she executed the same.

(s) R. Earl Dillman
Notary Public

Appendix No. VII

Oct. 29, 1959

Recorded at Request of Glen M. Hatch Oct. 29, 1959 at 10 A.M. Fee Paid $4.00 Wayne G. Whiting by Mary G. Chipman. Dep. Book .... Page 50 Ref:.... Mail tax notice to ..... Address .....

MORTGAGE

ELIZABETH C. BUMGARNER, a female mortgagor of FT. DUCHESNE, County of UINTAH, State of Utah, hereby MORTGAGE to PARLEY PROBST of HEBER, WASATCH COUNTY, UTAH for the sum of THIRTY FIVE THOUSAND DOLLARS, the following described tract of land in WASATCH County, State of Utah:

> Sections 13, 14, 23, 24 and 26 in Township 4 South, Range II West, USB & M, containing 3200 acres, more or less. Subject to reservation in the United States of all minerals and mineral rights, but including all water rights and other appurtenances thereto.

This mortgage is given to secure the following Obligations: A contract between the parties of even date herewith, and performance of the terms thereof which require, among other things, re-payment of Thirty Five Thousand Dollars, in the event of a failure of mortgagor to perform the provisions thereof.

The mortgagor agrees a reasonable attorney's fee in case of foreclosure.

WITNESS the hand of said mortgagor, this 28th day of October, A.D. nineteen hundred and fifty nine.

(s) Elizabeth C. Bumgarner

Signed in the Presence of
R. Earl Dillman

STATE OF UTAH
County of Duchesne

On the 28th day of October, A.D. 1959 personally appeared before me Elizabeth C. Bumgarner, a female the signer of the within instrument, who duly acknowledged to me that she executed the same.

(s) R. Earl Dillman
Notary Public

My commission expires January 22, 1962.
Residing in Roosevelt, Utah

Appendix No. VIII

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR DUCHESNE COUNTY, STATE OF UTAH CREDITOR'S CLAIM

In the matter of the Estate of

ELIZABETH BAUMGARNER POOWEGUP,
Deceased,

Estate of
ELIZABETH BAUMGARNER POOWEGUP,
Deceased,

TO: ORANNA B. MOOSMAN,
ADMINISTRATRIX, Dr.

Decedent during her lifetime entered into the Agreement and Mortgage, copies of which are hereunto attached and incorporated herein by reference. Pursuant to the Agreement and Federal Law, decedent, of her estate, can convey title to Claimant only by offering the land in question to the members of the full-blood or mixed-blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation. That after August 27, 1964, said Estate can convey the tract described in the Agreement and Mortgage without such offering. This claim is made to enforce the provisions of the attached Agreement and for this purpose to demand in the alternative the following:

(a) That the land be offered in accordance with the agreement and Federal law, and in the event that

the same is not sold pursuant to such offering, that the same be forthwith conveyed to Claimant. If bids are made at the time of the offering Claimant demands the rights assured him under the contract to buy the same at a higher figure than the bid.

(b) In the event that the same is not offered by the Administratrix prior to August 27, 1964, that the same be forthwith conveyed to Claimant.

(c) In the event of the failure of the Administratrix to convey the tract to the Claimant, or in the event of the failure of the Claimant to obtain title to said tract pursuant to proceedings in specific performance, then Claimant claims under the agreement and mortgage and his right to foreclosure thereof, the sum of Thirty-Five Thousand Dollars ($35,000.00), together with interest at the rate of six (6) per cent per annum from the date of October 28, 1959, and furthermore for damages for breach of contract, loss of the benefits of his bargain and for improvements to the premises in the additional amount of Thirty-five Thousand Dollars ($35,000.00).

STATE OF UTAH)
COUNTY OF) ss.

Parley Probst, whose claim is herewith presented to the Administratrix, Oranna B. Moosman, of the estate of Elizabeth Bumgarner Poowegup, deceased, being first duly sworn, on his oath says that the amount thereof, is justly due to said Claimant, that no payments have been made thereon which are not credited and that

there are no offsets to the same to the knowledge of the affiant.

(s) Parley Probst

Subscribed and sworn to before me this 23rd day of March A.D. 1964.

(s) Glen M. Hatch

The foregoing claim of Parley Probst in the amount of ..... is hereby approved and allowed the ..... day of ....., A.D. 1964.

Administratrix of the Estate of
Elizabeth Bumgarner Poowegup
Deceased

The foregoing claim of Parley Probst is hereby allowed this ..... day of ....., A.D. 1964, and the Administratrix authorized to make payment thereof.

.....
Judge

Received a copy of the foregoing this 24th day of March, 1964.

(s) John C. Beaslin
Attorney for Estate

Appendix No. IX

THE UNITED STATES OF AMERICA,
To all to whom these presents shall come, Greeting:

WHEREAS, an Order of the authorized officer of the Bureau of Indian Affairs is now deposited in the Bureau of Land Management, directing that according to the provisions of the Act of August 27, 1954 (68 Stat. 868), a fee simple patent issue to Elizabeth C. Bumgarner, for the following described land:

Uintah Meridian, Utah.

T. 4 S., R. 11 W.,
Sec. 13, All;
Sec. 14, All;
Sec. 23, All;
Sec. 24, All;
Sec. 26, All.

The area described contains 3,200 acres, according to the Offical Plat of the Survey of the said Land, on file in the Bureau of Land Management:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Elizabeth C. Bumgarner, and to her heirs, the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Elizabeth C. Bumgarner, and to her heirs and assigns forever.

This patent is issued subject to the reservation of all oil, gas and other minerals to the United States in trust for the beneficial owners thereof, their heirs and assigns.

Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blood and mixed blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of such grantee who is also a member of the mixed-blood group as defined in the act, it being the intention of this provision to effectuate the purpose of section 15 thereof.

The property herein conveyed shall be exempt from property taxes for a period of seven years from August 27, 1954, as provided in the Act of August 27, 1954 (68 Stat. 868), as amended August 2, 1956 (70 Stat. 936), unless the original grantee herein parts with title thereto, either by deed, descent succession, foreclosure of mortgage, sheriff's sale or other conveyance: Provided, that the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of Section 17 of said Act.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of

June 17, 1948 (62 Stat., 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the Twentieth day of September in the year of our Lord one thousand nine hundred and sixty and of the Independence of the United States the one hundred and eighty-fifth.

For the Director, Bureau of Land Management.

By Ruth W. Talley.
Chief, Patents Section

Patent Number 1212876
(Seal)

Appendix No. X

..... CHECK FACIMILE HERE .....

NOTICE OF OFFER TO SELL AND ACCEPTANCE THEREOF

Re: Offer to Sell by Elizabeth C. Bumgarner, M.B. No. 30, dated October 28, 1959 and amended November 11, 1960, as construed in Ute Indian Tribe of the Uintah and Ouray Reservation vs. Probst, Docket Nos. 125 and 126-69, Tenth Circuit Court of Appeals, concerning the following described real property:

All of Sections 13, 14, 23, 24 and 26 in Township 4 South, Range 11 West, U.S.B. and M., containing 3,200 acres, more or less. Subject to reservation in the United States of all minerals and mineral rights.

Including all water rights and other appurtenances thereto.

ACCEPTANCE OF OFFER TO SELL

The purchaser accepts the Offer to Sell the above-described property on the terms and conditions set forth

in the Offer To Sell and pay the seller the sum of $35,000.00, plus interest thereon from October 28, 1959, to November 11, 1960 in the amount of $2,180.64, representing a total sum of $37,180.64.

Date: July 6, 1970

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH

By Preston V. Allen
Purchaser

320 Kearns Building
Salt Lake City, Utah 84101

Note: Failure to submit a deposit of not less than 10% of the amount offered shall be cause for rejection of the offer.

RESOLUTION

Anita Reyos, Secretary of Affiliated Ute Citizens of the State of Utah, does hereby certify that the following resolution was adopted by the Board of Directors of said association at a meeting duly held on July 3, 1970:

> RESOLVED, that the President of the association, Preston Allen, is hereby authorized to execute appropriate documents on behalf of AUC accepting the offer of Parley Probst for the purchase of the lands described in the Probst case and the Treasurer of the association, Joseph A. Workman, is authorized to sign a check on the account of AUC in the amount of $37,180.64, or such lesser amount as is presently on deposit, for the acceptance of the Probst offer.

Mrs. Anita Reyos
Secretary

NOTICE

TO: The Superintendent of the Uintah and Ouray Reservation; The Ute Indian Tribe and its legal counsel; Parley Probst and his legal counsel; the United States Bureau of Reclamation; and Whomever may be concerned

1. The following described land was purchased by Elizabeth C. Bumgarner, M.B. No. 30, pursuant to the provisions of Public Law 83-671:

> All of Sections 13, 14, 23, 24, and 26 in Township 4 South, Range 11 West, U.S.B. and M., containing 3,200 acres more or less. Subject to reservation in the United States of all minerals and mineral rights.
>
> Including all water rights and other appurtenances thereto.

At all times prior to August 27, 1964, said land was subject to the restrictions and conditions of Public Law 83-671.

2. On or about October 28, 1959, Elizabeth C. Bumgarner offered to sell said lands to Parley Probst, which offer was amended on or about November 11, 1960, and provided for a purchase price of $35,000.00.

3. 25 U.S.C. 677n provides that in the event a member of the mixed-blood group determined to dispose of any real property acquired under Public Law 83-671 prior to August 27, 1964 "he shall first offer it to the members of the Tribe." 25 C.F.R. 243.6 provides that in the event of an offer to sell, the Superintendent of the Uintah and Ouray Reservation must notify the mixed-blood "corporations . . . and the tribe." The Court

in *Ute Indian Tribe v. Probst*, 125 and 126-69 (Tenth Circuit Court of Appeals), held that the requirement of notice to the Tribe, together with the doctrine that "what the members of the Tribe can do individually they can do collectively," resulted in a statutory right of first refusal in the Tribe which could be exercised within a reasonable period of time.

4. As of October 28, 1959, and November 11, 1960, when the Bumgarner-Probst offer was made, the rights of Affiliated Ute Citizens of the State of Utah and the Ute Indian Tribe to act for and on behalf of their Indian members was exactly the same, based upon the same statutory provisions, and remains the same at the present time. Affiliated Ute Citizens of the State of Utah is also an organization of "members of the tribe" which may act collectively, and whose members were also entitled to notice of any offer to sell under 25 C.F.R. 243.6.

5. The mandate in said *Probst* case was returned to the United States District Court for the District of Utah on July 6, 1970.

6. Affiliated Ute Citizens of the State of Utah was not a party to said *Probst* case, although it sought to intervene therein, which request was objected to by the attorney for the Tribe and denied. Accordingly, said *Probst* case does not bind Affiliated Ute Citizens of the State of Utah nor are any of its rights under Public Law 83-671 concluded by said *Probst* case.

7. Affiliated Ute Citizens of the State of Utah has elected to accept the Bumgarner-Probst offer, and attaches hereto a copy of its acceptance of the offer to-

gether with its certified check covering 10% of the purchase price of $35,000.00 plus interest during the period October 28, 1959 and November 11, 1960, in accordance with the regulations established under Public Law 83-671.

8. The original of each of said instruments is submitted to the Superintendent of the Uintah and Ouray Reservation, in accordance with the provisions of Public Law 83-671 and the regulations thereunder. Affiliated Ute Citizens hereby requests that said Superintendent issue his notification of the acceptance of said offer to Parley Probst or any other persons who may be interested. In the event that there is more than one acceptance of said offer, Affiliated Ute Citizens of the State of Utah hereby requests said Superintendent to notify each of said offerors to submit sealed bids in accordance with 25 C.F.R. 243.7, and in accordance with the procedures established under Public Law 83-671.

Dated this 6th day of July, 1970.

Parker M. Nielson
Attorney for Affiliated Ute Citizens
320 Kearns Building
Salt Lake City, Utah

Subscribed and sworn to before me this 6th day of July, 1970.

(Indistinguishable)
Notary Public
Residing in Salt Lake City, Utah

My Commission Expires:
July 6, 1973

Appendix No. XI

25 U.S.C. § 677. Purpose

"The purpose of sections 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust and restricted property of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property."

25 U.S.C. § 677(a). Definitions

"For the purposes of sections 677-677aa of this title—

(a) 'Tribe' means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

(b) 'Full-blood' means a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 677c of this title.

(c) 'Mixed-blood' means a member of the tribe who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice under the provisions of section 677c of this title.

(d) 'Secretary' means Secretary of the Interior.

(e) 'Superintendent' means the Superintendent of the Uintah and Ouray Reservation, Utah.

(f) 'Asset' means any property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States.

(g) 'Adult' means a member of the tribe who has attained the age of twenty-one years.

25 U.S.C. § 677(aa). Procedure by Secretary upon non-agreement between mixed-blood and full-blood groups.

"Whenever any action pursuant to the provisions of sections 677-677aa of this title requires the agreement of the mixed-blood and full-blood groups and such agreement cannot be reached, the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups."

25 U.S.C. § 677l.(5)

"(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group, after deducting reasonable cost of sale and distribution."

25 U.S.C. § 677n. Disposal by mixed-blood members of their individual interests in tribal assets; requisites and conditions

"Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to

termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period."

Appendix No. XII

25 C.F.R. § 121.12

"Prior to making or approving a sale, exchange, or gift of trust or restricted land, an appraisal shall be made indicating the fair market value of such land. If the highest bid received at an advertised sale is less than the appraised value, the bid may be accepted with the consent of the owner(s) if the bid approximates the appraised value and is, in the judgment of the secretary, the highest price that may be realized in the circumstances."

25 C.F.R. § 121.61

"The commissioner of Indian affairs or his authorized representative may approve mortgages or deeds of trust on any individually owned trust or restricted land whenever such lands under any law or treaty may be sold with the approval of the Secretary of the Interior or his duly authorized representative. The approval of such a mortgage or deed of trust terminates the trust or restricted status of the land only with the respect to such mortgage or deed of trust and only for the purpose of permitting foreclosure or sale pursuant to the terms of the mortgage or deed of trust in accordance with the laws of the state or territory in which the land is situated."

25 C.F.R. § 243.2 Definitions

"As used in this part:

(a) 'Full-blood member' means each person whose name appears on the final roll of full-blood members as published in the Federal Register on April 5, 1956 (21 F.R. 66), and such other persons as may be admitted to membership in the

tribe after August 27, 1954, in the manner provided in the constitution and bylaws of the tribe.

(b) 'Mixed-blood member' means each person whose name appears on the final roll of mixed-blood members as published in the Federal Register on April 5, 1956 (21 F.R. 66).

(c) 'Member of the tribe' means all mixed-blood and full-blood members as defined in paragraphs (a) and (b) of this section.

(d) 'The corporations' means: (1) Ute Distribution Corporation, a Utah Corporation; (2) Antelope-Sheep Range Company, a Utah Corporation; (3) Rock Creek Cattle Range Company, a Utah Corporation."

(e) 'The Act' means the Act of August 27, 1954 (68 Stat. 868-878; 25 U.S.C. 677-677aa).

(f) 'Tribe' means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

(g) 'Real Property' means any interest in land set apart to the mixed-blood group and thereafter acquired by mixed-blood members under the terms of the Act, and does not include lands described in section 9 of the Act (25 U.S.C. 677h).

(h) 'Termination of Federal supervision' means termination of Federal supervision over the particular real estate involved by the issuance of a patent in fee or other similar title document, and does not mean termination of the wardship relationship between the Indian and the United States on the occasion of the issuance of a so-called 'Termination Proclamation.'"

25 C.F.R. 243.3 Disposal of interests prior to termination of Federal supervision.

"Any mixed-blood member may dispose of his interest in any real property, as herein defined, after having first offered to the members of the

tribe an opportunity to meet his sales price or to meet the highest acceptable bona fide offer received by him. The offer shall be made in accordance with the procedures set forth in § 243.5 through 243.10 of this Part 243, and, as far as practicable, with the methods of sales set forth in Part 121 of this chapter. Any contract for the sale of such property to be valid must be approved by the Secretary of the Interior or his authorized representative. The requirement of secretarial approval shall no longer be applicable after termination of Federal supervision, as herein defined."

25 C.F.R. § 243.4 Disposal of interest subsequent to termination of Federal supervision.

"Subsequent to the termination of Federal supervision over the property of a mixed-blood member, as herein defined, and before August 27, 1964, any mixed-blood member may dispose of his interest in any real property, as herein defined, after having provided members of the tribe with an opportunity to meet his sales price or meet the highest bona fide offer received by him, which opportunity shall be referred to as a 'right of first refusal' in members of the tribe. This shall be a covenant running with the land as to all mixed-blood members and shall be set forth in each deed or other instrument of conveyance in the following language:

Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blood and mixed-blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of

such grantee who is also a member of the mixed-blood group as defined in the act, it being the intention of this provision to effectuate the purpose of section 15 thereof."

25 C.F.R. § 243.5 Offer.

"Any mixed-blood member of the tribe desiring to dispose of his interest in real property, as herein defined, prior to termination of Federal supervision over such property, must notify the Superintendent of his desire to dispose thereof, and shall state the price and terms upon which the land is offered for sale or which constitute a bona fide offer to purchase."

25 C.F.R. § 243.6 Notice of offer.

"The Superintendent shall notify in writing the corporations and the tribal business committee of the tribe of any offer of sale, and shall post notices of the offer of sale in a conspicuous place in the Uintah and Ouray Agency Office at Fort Duchesne and in the Post Offices of the towns of Roosevelt, Whiterocks, Randelett, Myton, and Fort Duchesne, Utah, for a period of at least ten days. The notices shall specifically describe the terms upon which such sale is to be made and the final date for acceptance of offer from members of the tribe by submission of an appropriate bid."

25 C.F.R. § 243.7 Acceptance of offer.

"Upon receipt of an acceptance of the offering from any member of the tribe to purchase such land, the Superintendent shall immediately notify the mixed-blood member making the offer to sell such land and the sale may be completed in accordance with the offer and acceptance. In the event two or more members of the tribe submit an acceptance of the seller's offer, the Superintendent shall call for sealed bids from the parties sub-

mitting such acceptances and the sale shall be made to the highest bidder provided the highest bid equals or exceeds the seller's offering price."

25 C.F.R. § 243.11 Sales by corporation.

"In the event any of the corporations determine to dispose of any of the land acquired under the provisions of the Act, at any time prior to August 27, 1964, such corporation shall first offer the land to the members of the tribe in accordance with procedures set forth in §§ 243.5 through 243.10."

25 C.F.R. § 243.12 Sale of stock in the corporations.

"In the event any stockholder of the corporation determines to sell or dispose of any stock owned by him in any of the corporations prior to August 27, 1964, he shall first offer it to the members of the tribe in accordance with the provisions set forth in the Articles of Incorporation and in the certificate of stock of such corporation and in the manner provided in §§ 243.5 through 243.10, as far as practicable."

Appendix No. XIII

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ANITA REYOS, et al.,
Plaintiffs, Appellees and Cross-Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Defendants, Appellants, and Cross-Appellees.

No. 40-69
No. 41-69
No. 42-69
No. 43-69
No. 44-69

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

June 1970 Term

ANITA REYOS, et al.,
Plaintiffs, Appellees and Cross-Appellants,

vs.

No. 40-69

UNITED STATES OF AMERICA, et al.,
Defendants, Appellants, and Cross-Appellees.

ANITA REYOS, et al.
Plaintiffs, Appellees
Cross-Appellants,

vs. No. 41-69

FRED BURSON, et al.
Plaintiffs-Appellants.

ANITA REYOS, et al.
Plaintiffs, Appellees
and Cross-Appellants,

vs. No. 42-69

JOHN B. GALE, et al.
Defendants-Appellants.

ANITA REYOS, et al.
Plaintiffs, Appellees,
and Cross-Appellants,

vs. No. 43-69

VERL HASLEM, et al.
Defendants-Appellants.

ANITA REYOS, et al.
Plaintiffs, Appellees,
and Cross-Appellants,

vs. No. 44-69

FIRST SECURITY BANK OF UTAH, N.A., a banking corporation of the State of Utah, et al.
Defendants-Appellants.

Appeal from the United States District Court For The District of Utah, Central Division (District Court No. C-39-65).

Edmund B. Clark, Attorney, Department of Justice, Washington, D.C. (Shiro Kashiwa, Assistant Attorney General, Washington, D.C., William T. Thurman,

United States Attorney, and H. Ralph Klemm, Assistant United States Attorney, Salt Lake City, Utah, and Roger P. Marquis, Attorney, Department of Justice, Washington, D.C., with him on the Brief) for Appellant, United States of America.

Richard C. Cahoon, Salt Lake City, Utah (Thomas R. Blonquist of Burton, Blonquist, Cahoon, Matheson & Shaffer, Salt Lake City, Utah, with him on the Brief), for Appellant, John B. Gale.

Hardin A. Whitney, Jr., Salt Lake City, Utah (O. Wood Moyle III, Salt Lake City, Utah, with him on the Brief), for Appellant, Verl Haslem.

Marvin J. Bertoch, Salt Lake City, Utah (Merlin O. Baker, of Ray, Quinney & Nebeker, Salt Lake City, Utah, with him on the Brief), for Appellant, First Security Bank of Utah, N.A.

Parker M. Nielson, Salt Lake City, Utah (Adam M. Duncan, Salt Lake City, Utah, with him on the Brief), for Appellees, Anita Reyos et al.

Before LEWIS, Chief Judge, SETH, Circuit Judge, and BRATTON, District Judge.

SETH, Circuit Judge.

These suits were commenced by eighty-five individuals with whom the United States originally had full trust relationship as Indians of the Tribe of the Uintah and Ouray Reservation in Utah. Of this group of plaintiffs twelve individuals were selected by the parties as the ones whose cases would be tried first as test cases. These are referred to as the "designated" plaintiffs and are the appellees herein.

An Act of Congress directed that the federal trust relationship with the mixed-bloods of the Tribe be ter-

minated, and the tribal property be divided between the mixed-blood and the full-blood groups. This is referred to as "termination." All *plaintiffs* belonged to the group of some 490 individuals designated by statute as the *mixed-bloods* of the Tribe.

The termination statute (68 Stat. 868, 25 U.S.C. §§ 677-677aa) permitted the mixed-blood group *to form associations or corporations* to handle some of the property difficult or impossible to distribute to individuals which was allocated to the mixed-blood group, and for matters of general concern to this group. One such corporation so formed was the Ute Distribution Corporation, the stock of which and the stockholders are concerned in these suits.

One type of property which the termination statute stated was not to be distributed to individuals was the gas, oil and mineral interests. Upon division of the tribal property, a portion thereof in undivided interests was allocated to the mixed-blood group. The Ute Distribution Corporation was organized to "handle" this interest of the mixed-bloods jointly with the Tribal Committee which had authority over the full-bloods' share. It was also organized to distribute the group's portion of unliquidated claims against the United States.

Ten shares of stock in the UDC were issued to each person in the mixed-blood group, and distributions or dividends were paid to the stockholders from time to time. The defendant bank entered into a contract with this corporation to act as transfer agent and to provide to it some record keeping and related services. In addition, the bank, under the termination statute, was au-

thorized to act as trustee of express trusts for mixed-bloods who, in the opinion of the Secretary of the Interior, needed such help.

The individual defendants Gale and Haslem were assistant managers of a facility of the bank located in an area where a number of the mixed-bloods lived, and who dealt directly with some of the plaintiffs in the sale or transfer of their stock.

The plaintiffs were stockholders of the UDC who sold shares of their stock to non-Indians. The bank facilities and services were used in connection with these sales or some of them. The causes of action against the bank allege a breach of the bank's duty arising from the agreement with the UDC and from its participation in the sales of stock. The action against the bank is also based on Regulation 10b-5 of the Securities and Exchange Commission. The causes alleged against the individual defendants Gale and Haslem are based solely on this Regulation.

Some time after these suits were filed the complaints were amended to include a cause of action against the United States under the Tort Claims Act. This cause alleged a breach of duty by the Secretary of the Interior and the local officials of the Bureau of Indian Affairs in connection with the transfer of the shares of stock.

The trial court, in some one hundred pages of findings and conclusions, found the defendant bank and defendants Gale and Haslem liable for damages to each of the twelve plaintiffs whose cases were selected as test cases for all sales made by them. The United

States was found liable only as to some of the plaintiffs. The trial court used the figure of $1500 per share as a value for computing damages.

All defendants have appealed from the judgment of the trial court, and the twelve designated plaintiffs, whose cases were tried, have cross-appealed on the ground that the damages were inadequate.

Liability of the United States Under the Tort Claims Act:

The position or status of the plaintiffs as related to the provisions and the execution of the termination statute has become one of the fundamental issues on this appeal. The statute, Public Law No. 83-671 (25 U.S.C. §§ 677-677aa), provides solely and expressly for the termination of the federal trust relationship to the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, and for termination of federal supervision over the trust and restricted property of the mixed-blood members of the Tribe. It directs that there be made a division of the tribal property between the mixed-blood and the full-blood members, and provides the procedure for termination of the mixed-bloods.

As examination of the significant portions of the statute is necessary for a proper consideration of the issues. The statute provides for the preparation of membership rolls for each group and the partition and distribution of the tribal assets between the two groups. *It also states that upon distribution of the divisible property to the mixed-blood members, federal supervision of such member and his property shall thereon*

be terminated except as to property not susceptible of practical distribution such as oil, gas, and mineral rights which shall remain subject to the provisions of the Termination Act. Upon termination the mixed-blood individuals shall not be entitled to the services performed by the Government for Indians; that statutes of the United States which affect Indians because of their status shall no longer be applicable to such persons, and that the laws of the several States shall apply to the said members in the same manner as to other citizens within the State. The statute further states that the Secretary shall " . . . protect the rights of members of the tribe who are minors, non compos mentis, or, in the opinion of the Secretary, in the need of assistance in conducting their affairs, by such means as he may deem adequate, . . . " Provision is made for the mixed-blood members of the Tribe to organize for common purposes and adopt a constitution and bylaws. The Act specifically recites that corporations may be formed by the mixed-bloods for grazing of livestock, for the "handling" of water and water rights, and that distribution of property may be made to such corporations.

As to gas, oil, and mineral rights in the Ute lands, provision is made that these interests be held in undivided shares by the full-blood members on the one hand, and by the mixed-blood group on the other hand. The Act contemplates that an organization be formed by the mixed-blood group for the purpose of empowering individuals to act as "the authorized representatives of said mixed-blood group in the joint management with the tribe and in the distribution and

(sic) [of] unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind. . . . " As indicated in the foregoing sentence provision is made in the Act for the joint management of the gas, oil, and other mineral rights by the Tribal Business Committee and the "authorized representatives" of the mixed-blood group. The Act directs that the net proceeds therefrom after deducting the cost chargeable to such management shall be divided between the full-blood and the mixed-blood groups in proportion to their respective numbers on the final membership rolls.

The statute directs that at a stated time the Secretary of the Interior *issue a proclamation that the federal trust relationship is terminated. This proclamation was so issued on the 26th day of August*, 1961, following the distribution of the property to the mixed-blood members excepting the oil, gas, and minerals as contemplated by the statute.

The mixed-bloods formed a corporation in 1956, the Ute Distribution Corporation (UDC), and 4900 shares of stock were issued. Each mixed-blood received ten shares. The corporate charter recites that it was formed to "manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe" the gas, oil, and mineral rights in common ownership and unliquidated claims against the United States. This was the undistributed property and legal title remained in the United States. The Secretary of the Interior acquiesced in the formation of the corporation, and approved the Articles of Incorporation. The transfer of shares in this corporation by the plain-

tiff mixed-bloods to non-Indians gave rise to this litigation. The defendant bank became the transfer agent for the transfer of shares of UDC stock. Distributions to UDC shareholders of receipts from mineral leasing were made from time to time.

Of particular significance to the issues on this appeal is a provision in the termination statute giving the right to the mixed-blood members to dispose of property they received by distribution. This section states:

> "Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period." (25 U.S.C. § 677n).

See also the Secretary's Regulations at 25 C.F.R. § 243.8.

The essential elements of the quoted section were incorporated in the Articles of Incorporation of the Ute Distribution Corporation to govern the sale of the corporate shares. Thus in the event that a stockholder

of the Ute Distribution Corporation desired to sell his stock before August 27, 1964, it was necessary that it first be offered for sale at a stated price to the Tribe or to the members of the Tribe. The procedures and the documents necessary to carry out this provision were arranged for and agreed upon by the local representative of the Bureau of Indian Affairs, by the defendant bank as transfer agent, and by the UDC.

Much of the testimony during the trial concerned the execution and delivery of various documents which were required to carry out this requirement of the corporate charter. *This provision can best be referred to as a right of refusal in the members of the Tribe or the Tribe. It expired on August 27, 1964.*

As indicated above, the trial court determined that the United States was liable to the plaintiffs under the Tort Claims Act by reason of a breach of duty in connection with the plaintiffs' sale of their shares of stock in the UDC. *This is based on a conclusion that a residual wardship or trust relationship existing between the United States and the plaintiffs survived the statutory termination procedures.* The trial court found that the United States had a duty to discourage and to prevent "inconsiderate," "improper," "illegal," and "improvident" sales by the plaintiffs to non-Indians. The court further found that if the United States had prevented irregularities in connection with such sales, "... said sales would not have been made, and that the sales of their stock by the designated plaintiffs was the proximate result of the failure of the United States ... to use reasonable care." The court also determined that the United States had reasonable cause to know

that the plaintiffs were being imposed upon and that the other defendants were acting improperly. Thus the court held that the negligence of the United States was the proximate cause of the sale of the stock by the plaintiffs.

In its findings and conclusions the trial court does not refer to any particular source of the Government's duty other than the statement that "limited aspects of the federal trust relationship continued until the later date [August 27, 1964] with respect to the restrictions governing the alienation of the stock in the Ute Distribution Corporation," and that under "such continuing duties," it was obligated to discourage and prevent improper and improvident sales. It would thus appear that the court found the limited trust-relationship to continue by reason of the right of refusal which was held by the members of the Tribe or the Tribe and applicable to sales of the corporate stock.

The plaintiffs in this appeal urge that some continuation of the supervision or wardship giving rise to a duty on the part of the United States resulted from the right of refusal. Plaintiffs refer to the provision as a "restriction on property."

We must hold that the trial court was in error in this respect. The provision in the Articles of Incorporation that if the stock was to be *sold before August 27, 1964, it should first be offered to "members of the Tribe," constitutes no more than a typical right of refusal in the members of the Tribe or in the Tribe.* It was somewhat more difficult to carry out by reason of the fact that notice had to be given to a fairly large

number of individuals and provision had to be made to advise the prospective seller that his offer had or had not been accepted by the members of the Tribe. This the Bureau of Indian Affairs undertook to do. It was also necessary if an offer was not accepted, and the prospective seller completed the sale to a stranger, to demonstrate to the Tribe or its members that the sale was in accordance with the offer made to them. This was done by an affidavit executed by the seller stating the sales price received. Other than these complications the provision is a commonplace one.

Considerable argument is presented as to whether or not the mixed-bloods were members of the Tribe for the purpose of the right of refusal or whether the right was in the Tribe as such or in the members, but this need not be decided for it is clear that the *plaintiffs themselves had no rights under the right of refusal.* For a discussion of this point see Ute Indian Tribe of the Uintah and Ouray Reservation v. Probst, Tenth Circuit, Nos. 125-69 and 126-69, April 20, 1969, ... F.2d .... (10th Cir.). *The shareholder who was here proposing to sell his stock cannot be considered to be within the group in which the right vested.* The right was granted clearly to permit the members of the Tribe, the Tribe, or the full-blood members to have the first right to purchase property, which was about to be sold to an outsider. This provision was for their benefit in an economic and practical way and if any purchase was to be made, the members of the Tribe or the Tribe had to do it. The record shows that the Tribe considered purchasing UDC shares when offered, but did not do so nor did any individuals in the Tribe. *The*

right of refusal did not create any "restricted property" in the shares as the term is generally used.

The right of refusal thus created no duty on the part of the Government to the then terminated mixed-blood plaintiffs who were seeking to sell their shares of stock. Likewise the procedures and documents devised to carry out the right of refusal, and their execution and delivery created no such duty on the part of the United States to the plaintiffs. *The statute expressly provides for termination of the Government's relationship with the individual mixed-bloods. The provisions are clear and the termination was accomplished and is final.* It is clearly within the power of Congress and no one else to provide for such an end to the relationship between these individuals and the Government. United States v. Waller, 243 U.S. 452; United States v. Nice, 241 U.S. 591; Tiger v. Western Investment Co., 221 U.S. 286. *It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination.*

There is not an abundance of authority on the application of termination statutes; however, the court in Crain v. First National Bank of Oregon, 324 F.2d 532 (9th Cir.), considered the Termination Act relating to the Klamath Tribe. There the court considered determinations made by the Secretary to create express trusts for those "in need of assistance in conducting their affairs," and the effectiveness thereof after termination. The court held that termination was complete except as to the express trusts, and recognized the power of Congress to provide the how, when, and extent of

termination. The plaintiffs here urge that the Crain case holds that there continues some trust relationship with all the termination members. Crain holds that where express trust exists, the individuals under such trusts cannot complain that their property is in trust while others may have received theirs outright. We are not concerned in the case before us with the property of individuals under express trusts. See also Menominee Tribe v. United States, 391 U.S. 404; and Klamath and Modoc Tribes v. Maison, 338 F.2d 620 (9th Cir.).

The trial court was thus in error in concluding that "limited aspects of the federal trust relationship continued," or that any form of wardship continued, and thus that some duty on the part of the Government to the plaintiffs continued after termination in connection with their sales of UDC stock. There being no duty the trial court was in error in awarding damages against the United States under the Tort Claims Act.

Position of Defendant Bank Under its Contract With The UDC:

The legal relationships and the business relationships between the plaintiffs and the defendant bank, and with the Ute Distribution Corporation were determined basically and initially by the contract which had been entered into between the bank and the UDC. This agreement was modified somewhat from time to time in practice. The contract was entered into in 1958, but the principal issues with which we are concerned took place in the years 1963, 1964, and 1965.

The principal purpose of the contract between the bank and the UDC was to have the bank provide stock

transfer services, to do the corporate record keeping, the corporate accounting, and handle distributions or dividends .

Of particular consequence in this case was the provision that the bank would act as stock transfer agent for the corporation, and would also assist the corporation in the conduct of its business. The record indicates that it was expected that the bank in the performance of its duties would also accommodate or provide stock transfer services for the individual stockholders of the corporation. This was demonstrated by the fact that the bank was to provide facilities and personnel at Roosevelt, Utah, in an area where many mixed-bloods resided, in order to accommodate transfers of stock. The trial court found that the Roosevelt office of the bank was maintained in part " . . . for the purpose of facilitating and assisting mixed-bloods in the transfer of Ute Distribution Corporation stock . . . . "

It is apparent that the transfers of stock of this particular corporation would be somewhat complicated by the existence of the *right of refusal* in the members of the Tribe, which has been hereinabove described. As indicated, this right of refusal necessitated the creation of forms which would demonstrate that the right of refusal had been complied with in order that the bank could proceed with its customary duties as transfer agent.

The contract provided for direct compensation to the bank as transfer agent. It is also apparent from the record that the bank was seeking individual accounts from the tribal members and others. It must be assumed

that the parties contemplated the usual notary fees and other ordinary fees incident to the transfer of shares.

As a saparate matter the bank had also solicited the use of its trust facilities for express trusts to be established by the Secretary for Indians whom he felt were not able to handle their property, all as provided in the termination statute. The position of the bank under these express trusts and the statutory provisions for them must be contrasted with the position of the bank in its capacity as transfer agent. The two created separate and distinct functions and duties on the part of the bank.

The stock transfer contract contained no provision whereby the bank was to discourage stockholders from selling or transferring their shares; instead the procedure which was established was to facilitate such transfers and located at a place convenient to prospective transferees.

As the contract was put into practice, the bank retained the stock certificates of the individuals, and the transfers were handled by stock powers in the usual way. The record shows that the certificates were so retained by the bank in order to prevent their loss by the individual stockholders with the attendant problems to the corporation and the transfer agent in replacing lost certificates. *As will be hereinafter mentioned, the stock certificates bore a warning or admonition to the owners to be careful in selling them as they were of undetermined value.* Since the stockholders did not have possession of the certificates, they did not have an opportunity to read this warning.

Much of the testimony on behalf of the plaintiffs concerned the contents of affidavits which were executed by the plaintiffs in connection with their sale of shares. These affidavits were devised to carry out the right of refusal in that they were to demonstrate that the individual stockholder had in fact sold the shares for the price that he had theretofore offered them to the Tribe or its members by public notice. The affidavit was thus to show that the members of the Tribe did in fact have a real first refusal at the actual selling price. The record shows that in some instances the affidavit may not have accurately described the facts in connection with the sale to the third party. Under the procedure the sale was to be for cash, but the record shows that instead some plaintiffs received automobiles or other tangible property directly or indirectly for their stock instead of cash, or part cash and part tangibles. Bank employees notarized most of these affidavits. The plaintiffs here thus complain that these affidavits which they executed were not accurate, and that the bank and its officials were aware that they were not correct. The record also shows that the Bureau of Indian Affairs office relied upon the recitations in the affidavits when received and issued to the bank a certificate which acknowledged that the right of refusal had been complied with and that the bank could proceed to transfer the shares in the usual way. No shares were transferred by the bank without having first received such a certificate during the period the right of refusal was operative.

The trial court expressly concluded that the bank had a duty to discourage the plaintiffs from the sale

of their shares of stock of the UDC. This finding or conclusion is not supported by the record as no such duty was created by the practice of the bank and none was provided in the contract. Instead the stock transfer provisions and facilities were provided in order to accomplish and facilitate transfers. *The bank was obviously obligated to transfer the shares before August 27, 1964, when requested and when the representative of the Bureau of Indian Affairs indicated that the right of refusal had been honored; and after August 27, 1964, when the stockholder requested that a transfer be made.*

The bank, shortly after the contract was executed, received a letter from the attorney for the Ute Distribution Corporation asking that it attempt to discourage sales, but no response was made to the letter and no duty or obligation was created thereby. As described above, Congress had directed termination of the Government's relationship with the plaintiffs, and this had been accomplished at the pertinent times. The business inexperience of the plaintiff stockholders does not give rise to any duty on the part of the bank to treat them in any manner different than it would treat any other customer inexperienced in business. The record is clear that the plaintiff's corporation, the UDC, and its officers were active in their attempts to discourage stockholders from transferring their shares and had written letters and held meetings on this subject, all apparently with little success.

It would appear that the trial court placed considerable reliance in reaching its conclusion on the asserted inaccuracies in the affidavits executed by the plaintiffs concerning their ultimate sales of the shares.

However, the bank or the Government had no duty as to these plaintiffs to see that they executed affidavits that reflected the true transaction. Furthermore the affadivits were executed in connection with the right of refusal in which, as indicated above, the defendants had no inerest. It is difficult to see how they can complain of inaccuracies in their own affidavits.

The record shows that the bank officials at the Roosevelt office of the defendant bank were active in encouraging a market for the UDC stock among non-Indians. This was probably not contemplated by the UDC-bank relationship. This gave rise to some indirect benefits to the bank by way of increased deposits, but it did not constitute a violation of any duty the bank may have had to the plaintiffs by contract or otherwise.

Liability Under Regulation 10b-5 of the Securities and Exchange Commission:

The only cause of action alleged against the individual defendants Gale and Haslem is based upon the violation of Regulation 10b-5 of the Securities and Exchange Commission (17 C.F.R. § 240.10b-5). This regulation was promulgated under the authority of section 10(b) of the 1934 Securities and Exchange Act. Each plaintiff states a separate cause against each of such defendants.

The record shows that the defendant Gale purchased for resale for his personal profit ten shares of UDC stock from two of the plaintiffs. The several plaintiffs sold 122 shares of their stock in some thirty-

two separate transactions: The trial court found the defendant Gale liable on the sale of all of the 122 shares.

As to his individual purchases, the record shows that Gale bought five shares from the plaintiff, Glen V. Reed, on July 8, 1964, for $350 per share. This purchase was made by Gale for Neal H. Phelps and Esther Phelps, or were resold to such persons who paid Gale $530 per share for these shares. Defendant Gale did not advise plaintiff Reed of the resale.

Gale also purchased three shares of stock from the plaintiff, Letha H. Wopsock, some time after August 21, 1964, for $350 per share for resale at a higher price which is not disclosed in the record. He also purchased another share from the same person in October 1964 for $400 and an additional share in November 1964 for $350. The dispositoin by Gale of these two shares is not indicated in the record.

The record does not show whether or not the defendant Gale participated for his personal profit or derived a personal profit from the purchase by other persons of shares of stock from the plaintiffs.

The participation by the defendant Gale in the sales by other plaintiffs to other persons as shown in the record need not be described in detail. In these transactions a typical participation by the defendant Gale was to act as a notary upon affidavits executed by the purchaser in connection with such a sale which have been hereinabove described or to guarantee the seller's signature on a stock power which was the ultimate basis for the transfer of the shares of stock. As indicated above the trial court found the defendant

Gale liable on each of these transactions. However, we hold this to be in error.

The participation by the defendant Gale in the execution of documents as shown by the record in connection with these sales cannot constitute a breach of duty on his part to any of the plaintiffs. In this connection he did no more than to perform ministerial functions required to carry out the transfer of the shares of stock. In this connection the defendant had no obligation to determine whether the recitations made in the affidavit were correct or not. Furthermore, even if he may have known that the recitations in this affidavit were not entirely correct, the plaintiff executing the particular affidavit was prepared and did assert that the facts were correct, and defendant Gale had no obligation to perform anything but the requested ministerial acts.

As to the individual defendant, Verl Haslem, the record indicates a participation in the transactions which is similar to that described above as to the defendant Gale. The trial court also found this defendant liable on each of the thirty-two transactions covering the 122 shares sold by the plaintiffs in this action. The record shows that the defendant Haslem purchased in November 1964 one share of the UDC stock for a third party or for resale for his personal profit from plaintiff Workman for the sum of $350. This was resold by this defendant for an undisclosed price to his brother.

This defendant also purchased on August 31, 1964, five shares of stock from plaintiff, Glen V. Reed, for $400 per share and resold the stock apparently on the same day at a price not disclosed in the record.

This defendant Haslem "participated" in the other transactions much in the same maner as did the defendant Gale by the execution of affidavits and of signature guarantees and in some instances had nothing whatever to do with the sale. As to these transactions we find no duty on the part of this defendant to any of the plaintiffs as his acts were purely ministerial in character and were required to accomplish the stock transfers. Likewise his execution of affidavits or guarantees of signature gave rise to no liability to the plaintiffs. Again although the contents of the affidavit may not have been entirely correct, and the defendant may have known of this fact, it did not create any liability to the maker of the incorrect affidavit.

The record clearly shows that the defendant bank, the employer of the defendants Gale and Haslem, had knowledge that its employees were purchasing stock for their own account. Further the record shows that in these transactions, the employees used the bank facilities, premises, and personnel. Under these circumstances, these employees as far as the plaintiffs were concerned were apparently acting within their authority. Thus the bank did become liable for any violation of the Regulation 10b-5.

Regulation 10b-5 reads as follows:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> "(1) to employ any device, scheme, or artifice to defraud,

"(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Neither the regulation nor the Act contains any statement of standards to be applied or elements necessary in actions for civil liability to be brought under the Act, and in fact there is no express provision for such actions.

The origin of the rule, its relation to section 17 of the 1933 Act (15 U.S.C. § 77q(a)) and the initial doubt as to whether civil actions were contemplated need not be stated here as these matters are elsewhere fully described. Jensen v. Voyles, 393 F.2d 131 (10th Cir.); Doelle v. Ireco Chemicals, 391 F.2d 6 (10th Cir.); Crist v. United Underwriters, Ltd., 343 F.2d 902 (10th Cir.); Stevens v. Voyell, 343 F.2d 374 (10th Cir.). See, Cohen, Truth in Securities Revisited, 79 Harv. L.Rev. 1340; 3 Loss, Securities Regulation, ¶¶ 1785-86 ;Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir.); Kardon v. National Gypsum Co., 69 F.Supp. 512 (E.D.Pa.); Securities & Exchange Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir.) (258 F.Supp. 262); Annot., 37 A.L.R.2d 649; 59 Yale L.J. 1120; 20 Stan.L.Rev. 347; 63 Nw. U.L.Rev. 452; 16 U.C. L.A.L.Rev. 404.

As to the elements to be established, *the record shows that the individual defendants made a misstate-*

ment of a material fact in representing, in those instances wherein they purchased stock for sale at a personal profit, that the prevailing or market price was the figure at which their own purchase was made. This representation was obviously false in those instances in view of the fact that they resold the shares almost immediately at a higher price. The record shows that the plaintiffs considered these defendants to be familiar with the market for the shares of stock and relied upon them when they desired to sell their shares. The individual defendants, in stating to the plaintiffs in instances where individual purchases were made by the defendants with quick resale at a higher price than the price offered was "all that they could give" or "was all that it was worth" or similar statements, made a misrepresentation as to the prevailing price. The defendant Haslem testified with reference to his purchase from plaintiff Workman, "I contacted a number of people telling them that if they were interested in selling, I was interested in offering the highest price." The bank and the individual defendant employees had developed a market at the Roosevelt Agency of the bank for UDC stock, received inquiries from time to time for stock, and had customers of the bank who were prepared to make purchases from time to time. The defendant bank and the individual defendants were thus entirely familiar with the prevailing market for the shares at all material times.

The record shows in some instances that purchases for resale were made, but the resale price is not disclosed in the record. If in these instances there was a resale at a higher price, there was demonstrated thereby

a misrepresentation to the plaintiff concerned as to the prevailing market price. This was a material fact. List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.).

In Stevens v. Vowell, 343 F.2d 374, (10th Cir.), we considered a private action under Regulation 10b-5. The trial court had made findings that critical facts had been concealed from the plaintiff investor and misrepresentations were made to him. The court also specifically found that the plaintiff had there relied upon all the representations made to him by the defendants. These findings were supported by the record. There was no issue on appeal as to reliance, and little as to the fact of misrepresentations. We there stated that it was not necessary to prove common law fraud, but necessary to prove "one of the prohibited actions." This referred to one of the (a), (b) or (c) subsections of the rule. In the cited case the (b) subsection was relied upon and with the reliance established the case was proven. The opinion does not hold that reliance is not required, as the plaintiff urges. It is a basic element of a cause of this nature, and was there shown.

In the case before us the facts of misrepresentation have been shown as to several of the transactions. The record, however, does not contain any evidence relating to reliance by the plaintiffs on the representations of the defendants Gale and Haslem. This is a necessary element of the cause alleged. List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), considers, defines, and requires both materiality of the representations and reliance. See also 16 U.C.L.A. Rev. 404; 63 Nw. U.L. Rev. 434. The plaintiffs allege that certain acts and statements of the defendants were directed to them

or were the proximate cause of their damages. Thus the causal connection must be established—that in fact the loss resulted from defendants' acts—a simple and fundamental proposition in such actions for private damages. The plaintiffs' argument refers to several cases where the proceedings were brought by the SEC for enforcement. The matter of reliance was not there considered, but these are from an entirely different position.

The record does not support the trial court's finding of a conspiracy, plan, or scheme to violate any duties owed to the plaintiffs by any of the defendants. The trial court was in error in so finding.

The record shows sufficient evidence of the use of the mails or instrumentalities of commerce by the individual defendants in their violation of Regulation 10b-5 as described above. The testimony as to the use of checks, even on the defendant bank, together with the correspondence with prospective buyers is sufficient. The defendant Haslem purchased in what are referred to as "face to face" transactions with a plaintiff and the certificate was delivered. However, again a check or checks were used and the trial court's finding is supported on this issue although the facts are not well developed.

The pretrial order is not entirely clear as to the inclusion of transactions taking place after August 27, 1964. However, we agree with the trial court that these properly became trial issues.

The measure of damages has been referred to above briefly. We hold that the trial court was in error in

using the value of $1500 per share in the computation of damages as the evidence does not support such a figure. Also the evidence does not support the finding that the market price was depressed by the defendants. As to the cross-appeals, the evidence as to greater values was entirely speculative, as the trial court concluded.

The measure of damages for breaches of duty under Regulation 10b-5 is the profit made by the defendant on resale of stock purchased from the plaintiffs. If no resale was made or if the resale was not at arm's length, then the measure is the prevailing market price at the time of the purchase from the plaintiffs.

REVERSED and REMANDED for further proceedings in accordance with this opinion.

Appendix No. XIV

List of Pertinent Dates

Sept. 21, 1959	Resolution of Board of Directors of Affiliated Ute Citizens authorizing sale to Elizabeth Bumgarner, Resolution No. 59-320.
Oct. 28, 1959	First Agreement - Probst-Bumgarner
Oct. 28, 1959	Parley Probst to Bureau of Indian Affairs Check - $26,016.00 - Cashed November 9, 1959
	Parley Probst to Elizabeth Bumgarner Check - $1,484.00 - Cashed November 15, 1960.
Oct. 28, 1959	Mortgage - $35,000.00.
Oct. 29, 1959	Mortgage recorded.
Nov. 18, 1959	Minutes of Meeting - Curry present - Elizabeth and Strawberry purchase discussed.
August 11, 1969	Rules and Regulations of the Department of the Interior promulgated.
Sept. 20, 1960	Patent of U.S. Government to Elizabeth Bumgarner.
Nov. 11, 1960	Second Agreement between Probst and Bumgarner.
Nov. 14, 1960	Patent recorded in Wasatch County.
Nov. 27, 1963	Elizabeth Bumgarner died.
Jan. 20, 1964	Date Administratrix appointed.
March 24, 1964	Creditor's Claim filed.
Aug. 27, 1964	Government supervision of Indian land terminated.

Sept. 21, 1964	Administratrix Deed
Oct. 5, 1964	Administratrix Deed recorded.
Sept. 20, 1967	Date complaint filed by Ute Indian Tribe.
Oct. 27, 1967	Date Administratrix filed her cross-complaint.
Sept. 5 & 6, 1968	Trial of the case.
Jan. 7, 1969	Judgment of Trial Court.
Jan. 31, 1969	Notice of Appeal of Probst
April 20, 1970	Opinion filed by United States Court of Appeals, Tenth Circuit.
June 5, 1970	Per Curiam opinion on rehearing filed by United States Court of Appeals, Tenth Circuit.
June 19, 1970	Opinion filed by United States Court of Appeals, Tenth Circuit, in the Reyos case.
July 6, 1970	Affiliated Ute Citizens submit Notice of Acceptance of Offer